IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 373 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GOPALBHAI KANJIBHAI TADVI

Versus

STATE OF GUJARAT

Appearance:
MR JV DESAI for Appellant
Mr.Kamal Mehta, Addl.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 04/03/98

ORAL JUDGEMENT (Per Soni J.)

Deceased Chimanbhai and P.W.3 Prabhuas B Tadvi are the brothers, having cloth and grocery shops at village Navagam. Their shops are adjoining. P.W.3 Prabhudas had gone in the morning of 3.8.89 to the shop of Chimanbhai to discuss about the business. In the shop

of Chimanbhai, there were customers named Babu Shankar, Govind Lallu, Lallu Bapa, I.K.Bhatia. An employee of Chimanbhai named Champakbhai was also present. When his brother was talking about the account with Babu Shanker, Chimanbhai had asked Prabhudas to wait. In the meantime, accused entered the shop clandestinely and gave axe blow on the head of Chimanbhai and ran away. Blood started to ooze out, which stained the clothes of others who were present in the shop. Immediately Chimanbhai was removed to Hospital and the complaint was lodged before Police Sub Inspector, Kevadia colony. Offence was registered and investigated and the accused was chargesheeted in the court of J.M.F.C.,Rajpipla, who, in his turn, committed the case to the court of Sessions. The learned Additional Sessions Judge framed charge against the accused, to which accused pleaded not guilty and he was tried. On completion of the trial, accused was found guilty of an offence punishable under sec.302 and 452 of I.P.C. and is sentenced to R.I. for life under sec. 302 I.P.C. However, no separate sentence was ordered under sec.452 of I.P.C. This judgment and order dated 6.5.91 in Sessions Case No.192/89 of the court of Sessions Judge, Bharuch is assailed in this appeal.

Learned Advocate Mr.J.V.Desai has challenged the judgment and order of conviction on the grounds, namely, that the evidence of the alleged eye witnesses cannot be accepted as being of either relation or acquaintance of the deceased. It is an evidence of interested witnesses. Their evidence could not be accepted, particularly when there is no independent corroboration thereto. Mr.Desai contended that though the witnesses have stated that blood from the injury oozed to the extent that it stained the clothes of all who were present in the shop, yet cloth of none of those witnesses is seized by the Police, which could have established their presence at the time of incident. Mr.Desai contended that the motive with which the offence is alleged to have been committed, is not proved inasmuch as the said incident making out motive could not have occurred, as accused was on duty at the relevant time. Thirdly, the prosecution has failed to explain the injury on the person of the accused and it can be said that prosecution witnesses are suppressing the real genesis of the case and, therefore, their evidence is not believable. Mr.Desai contended that learned Additional Sessions Judge erred in accepting the evidence of the witnesses despite the above fact situation. He, therefore, contended that the appeal should be allowed and the appellant ("accused" for short) be acquitted.

Mr.Kamal Mehta, learned Addl. Public Prosecutor, supports the judgment of the learned Additional Sessions

Judge. Mr.Mehta contended that the evidence of eye witnesses is so cogent and convincing that assuming that the clothes of witnesses were stained with blood and were not seized, then also the evidence does not suffer from any infirmity which may entitle the court either to reject it or not to rely on it. Mr.Mehta contended that the prosecution no doubt is required to explain the injury on the person of the accused. However, that injury must be proved to have been caused at the time of commission of the act constituting offence. Mr.Mehta contended that when the accused was taken to the doctor for treatment of the injury on his person, in the hospital before the doctor the accused has disclosed that his injury was caused in the evening of 3.8.89. Doctor has also stated that the injury on the person of the accused is more than six hours old. When the accused himself has stated that the injury was caused in the evening of 3.8.89 and when the incident has taken place in the morning of 3.8.89, prosecution could not have explained the injury, as the same is not caused in the commission of the offence in question. Mr.Mehta also contended that in addition to the above explanation as to the injury on the person of the accused, the injury could be self-inflicted, as stated by the doctor. The said injuries are superficial, which could be caused by a fall. Mr.Mehta, therefore, contended that this is a full-proof case and evidence of the witnesses has been rightly relied on by the learned Additional Sessions Judge. The appeal, therefore, should be dismissed and the judgment of the learned Addl. Sessions Judge be confirmed.

On the date of incident i.e. in the morning of 3.8.89, brother of the deceased P.W.3 Prabhudas had gone to the shop of the deceased to talk about the business. When he went to the shop, he found one Babu Shankar P.W.6, Govind Lallu P.W.4 and others present in the shop. He also found Champaklal P.W.5, an employee of the deceased, present in the shop. He was asked by his brother to wait, as deceased was settling the account with Babu Shanker. In the meantime, accused came clandestinely and gave an axe blow on the head of Chimanbhai and ran away. This fact is corroborated by the evidence of P.W.4 Govind Lallu, P.W. 6 Babu Shanker and P.W.5 Champakbhai. From the cross-examination of these witnesses, nothing has been extracted, which may make their version about their having seen the incident either suspicious or doubtful one. P.W.6 Babu Shanker has also stated that he had gone to the shop of Chimanbhai in the morning of 3.8.89, where 10 to 12 customers were sitting and the brother of the deceased has also come; accused came there and gave an axe blow on

the head of Chimanbhai. There is nothing in the cross-examination of P.W.6 as well as P.W.4 to doubt their testimony or suspect the truthfulness thereof. P.W. 5 Champakbhai is an employee of deceased Chimanbhai. He was also present in the shop and has deposed to the effect as stated by P.W.3. His evidence is challenged on the ground that he had an enmity with the accused because of dispute of land. Except the bare allegation alleging dispute of land, defence has not been able to put on record anything to make that allegation effective. Thus, it is clearly established, and rightly accepted by the learned Additional Sessions Judge, that the accused came in the morning at about 9.00 - 9.30 and gave an axe blow on the head of Chimanbhai, deceased.

Immediately after the occurrence, Chimanbhai was taken to hospital and a complaint was registered by about 10.35 A.M. Incident took place at village Navagam. Deceased was taken to the hospital of Kevadia colony Narmada Project Hospital. There, he was examined by the doctors and he was referred to S.S.G. Hospital, Baroda after preliminary treatment. However, he died on the way and was brought back to Kevadia colony Narmada Project Hospital. He was declared dead by about 12.30 noon on that day. On receipt of the complaint, after completing necessary formalities, accused was arrested between 9.00 and 9.30 A.M. of 4.8.89 i.e. the next day of the incident. The accused was found injured and, therefore, he was sent to the doctor for medical examination by Police yadi Ex.15. On the basis of the yadi, P.W.13 Dr.Kamlesh had examined him and accused has disclosed before him that he was injured by an axe at about 9.45 PM on 3.8.89. The said injury was an incised wound of 1 1/2 x 1 cm, skin deep on medial finger. According to the doctor, said injuries were superficial and could be self-inflicted and also by a fall. From this certificate, it is clear that injury on the person of the accused was not caused at the time of incident or in the course of incident. The injury is caused practically after 12 hours of the incident. When nothing adverse has been suggested against any of the witnesses not to accept their oral version and the injury on the person of the accused is not caused at the time of the commission of the offence, it cannot be said that prosecution has failed to explain the injury on the person of the accused.

Defence has alleged that the motive attributed by the prosecution is not a real one and once the motive relied on by the prosecution is not acceptable, then the whole case of the prosecution must fail, as it can be said that the prosecution has come forward before the court with a wrong case and accused has been wrongly

roped in. It is the settled legal position that it is not necessary for the prosecution to prove motive in every case. It is also the settled legal position that even if the prosecution fails to prove motive or the motive alleged comes out to be untrue, then if there is cogent and consistent ocular evidence, prosecution should not fail on failure to establish motive. In the instant case, the prosecution has come out with the case that as deceased refused to lend money to the accused on the previous day, accused was annoyed and had caused the murder of the deceased. It is in evidence of the prosecution witnesses that on the earlier day when accused came to borrow money, he was drunk and deceased had told him that if he want to borrow money, he may come after he is out of the effect of the liquor. This demand of the money by the accused was at about 2.00 PM of the earlier day i.e. 2.8.89. According to the accused, he was on duty at the relevant time and, therefore, there is no question for him to go to the deceased to demand money. Prosecution, therefore, comes out with a false theory of demand. To show that accused was on duty, he has produced necessary duty certificate at Ex.35. By that certificate, it is clear that accused was on duty at Vaghodia Gate in the second shift between 13.00 and 21.00 hours. If accused was on duty on 2.8.89 between 13.00 and 21 hours, how could he have gone to deceased to demand money ? It is not shown as to how far is Vaghodia from village Navagam, where the shop of the deceased is located. It is alleged by the prosecution that the accused came at about 2.00 PM on 2.8.89. That is an approximate time. It may be little early and thereafter the accused might have reported on his duty. When such a probability cannot be ruled out, then it cannot be accepted that the accused would not have gone to demand money. That apart, even if that story is not a correct one, then also the ocular evidence in the instant case is so convincing and cogent that it is difficult to reject the same and the learned Addl. Sessions Judge has rightly done so.

No other contention is raised by learned Advocate Mr.Desai.

In the result, the appeal fails and is dismissed.
